

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1172

To be argued by
PETER M. BLOCH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1172

In the Matter

—of—

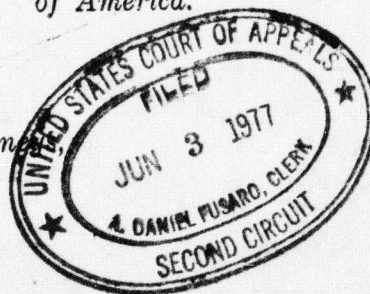
Testimony Before and Documents Subpoenaed by the
May 1976 Additional Grand Jury.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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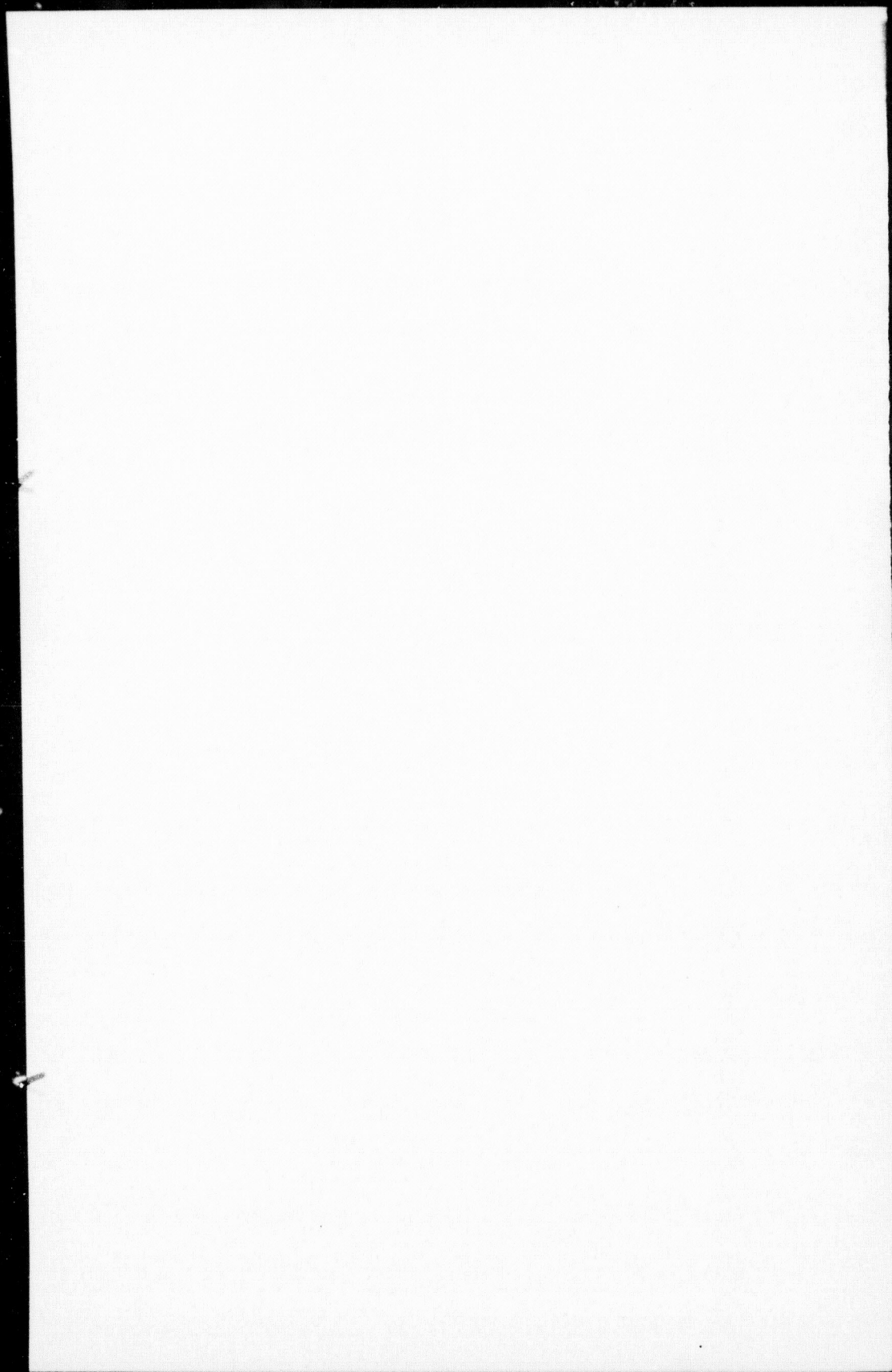


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Testimony Before and Documents Subpoenaed by the
May 1976 Additional Grand Jury.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert Beck and Jacob Freedman appeal from an order dated March 11, 1977, by the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, issued pursuant to F. R. Crim. P. 6(e), authorizing disclosure to three named government agents of material subpoenaed by and testimony before the May 1976 Additional Grand Jury with regard to an investigation involving the partnership of Beck and Freedman, Manalin Realty Company. (A-2-3).*

Statement of Facts

A. The May 1976 Grand Jury

The May 1976 Additional Grand Jury was impaneled specifically to inquire into fraudulent practices occurring within the jurisdiction of the Southern District of New

* References "A" are to the appellants' appendix.

York in the Medicaid/Medicare industry. These practices include, but are not limited to, fraudulent claims by both individual and institutional providers (either in excess of treatment given or for treatment not given at all); kickbacks by medical testing laboratories to doctors in order to insure exclusive patronage; evasion of taxes by either not reporting income received from kickbacks or falsely characterizing such income as legitimate business expense; and false statements to various federal and state agencies involved in administering the Medicaid/Medicare program. The possible violations flowing from these practices include but are not limited to both general crimes—such as 18 U.S.C. §§ 371, 286, 287, 1001, 1341—and violations of the tax laws, 26 U.S.C. §§ 7201, 7203 and 7206.

B. The Investigation—Its Organization

This appeal involves one small aspect of an important investigation involving inquiry into widespread fraud in the Medicare and Medicaid systems. In order to understand the issues on appeal, it is important to place its facts in the context of the entire investigation.

Prior to the impaneling of the May 1976 Additional Grand Jury, an open-ended Grand Jury investigation was authorized by the Internal Revenue Service (IRS) and the Department of Justice. This means that a *criminal** tax investigation is conducted by the Grand Jury, although Special Agents and Revenue Agents of the Internal Revenue Service, under the aegis and direct supervision of the Office of the United States Attorney, are also involved in the criminal investigation.

* The fact that the investigation was solely criminal was recognized by Judge Wyatt. (A-28).

The Federal Bureau of Investigation has assigned special agents to assist the investigation, also under the direct supervision of the Office of the United States Attorney, in developing violations of Title 18 arising out of fraudulent billing and other practices. In many cases, agents of both the IRS and FBI are cooperating in the development of cases (of which there are presently approximately twenty-five) which involve possible violations of both Title 18 and Title 26. (A-12).*

In addition to Agents of the IRS and FBI, investigative personnel (consisting of investigative auditors and experts in the operation of the Medicaid and Medicare programs) are detailed on a semi-permanent basis from the Department of Health, Education, and Welfare (HEW) to the Office of the United States Attorney. These persons work directly for and under the daily supervision of the Assistant United States Attorneys assigned to the investigation, and assist in various investigations both in a technical and an administrative capacity. (A-13). Because of the obvious complexity involved, and because of the high degree of interrelationship among the various investigations, Medicaid/Medicare fraud investigations are a team effort under the direct supervision of the Assistant United States Attorney assigned to a particular investigation. The IRS and HEW agents work in the physical confines of the United States Attorney's office.

At the beginning of the Medicaid/Medicare investigation, all personnel were thoroughly briefed by an Assistant United States Attorney concerning the absolute necessity of maintaining secrecy and control over all testimony and documents obtained by the Grand Jury. (A-14). All IRS agents were specifically advised that no disclosure of Grand Jury material was authorized outside of the Office of the United States Attorney. The

* No FBI agents are presently assigned to the Manalin Realty investigation.

IRS Revenue Agents, who were assigned on a full-time basis to assist the IRS Special Agents, were warned that they should not discuss any aspect of the case with other Revenue Agents not assigned to the case, who might later handle the civil features of the cases, in order to avoid any possible taint. The IRS has assured the Assistant United States Attorney in charge of its investigation that its Revenue Agents had been cautioned against any taint and that it would not conduct any parallel civil investigation until after the criminal aspects of the case are terminated. The material obtained through the criminal investigation would be used for a civil case, if at all, only after an order pursuant to F. R. Crim. P. Rule 6(e) had been obtained releasing it for that purpose. No leads are pursued by the Revenue Agents that do not relate to criminal matters. No interviews are conducted to develop evidence for a separate civil case, and indeed no civil cases have even occurred other than after the completion of a criminal case and the issuance of a formal 6(e) order.

Grand Jury subpoenas *duces tecum* in each investigation are signed and issued only under strict guidelines. In particular, the Government has sought to avoid unnecessary use of subpoenas by first attempting to obtain both documentary and testimonial evidence voluntarily. Frequently, as an accommodation a respondent may render an appearance before the Grand Jury unnecessary if the records are delivered by certified mail prior to the return date of the subpoena. Although these documents are not physically delivered to the Grand Jury, they are treated for secrecy purposes as if they had been so delivered.

C. The Manalin Realty Investigation—The Motion

On February 16 and 22, 1977, subpoenas *duces tecum* were served upon Manalin Realty (one of the several entities under investigation) for certain of its business

records. Counsel for Messrs. Beck and Freedman (two of the partners of Manalin) moved to quash both subpoenas on the grounds of privilege. After hearing arguments, Judge Wyatt granted the motions and quashed both subpoenas on the grounds that Manalin, a family partnership, was protected by the Fifth Amendment privilege against self-incrimination.

The second branch of the motion requested that all evidence previously obtained pursuant to prior grand jury subpoenas issued to Manalin Realty, Prospect Hospital (also owned by Beck and Freedman), or other persons as part of the investigation of Beck and Freedman be suppressed. In support of this branch of the motion, and without any factual support, the attorney for Beck and Freedman alleged in conclusory terms: (1) that the evidence was being disclosed in a manner "abusive" of Grand Jury process; (2) that the number of persons being granted access to the evidence "appeared" excessive; (3) that disclosure was being made to persons "not authorized by law" to conduct a tax investigation; and (4) that supervision by the Assistant United States Attorney "appeared" to be inadequate to assure the evidence was not revealed to "unauthorized persons" and not used for "improper purposes." (Affidavit in support of motion to quash and suppress by S. Andrew Schaffer, pg. 3-4). The alleged factual basis was the revelation that Mr. Katz of HEW handled the administrative details of timing of receipt of documents and that assisting IRS Special Agent Hoffman were IRS Revenue Agents who were characterized as working basically in determining civil tax liabilities. (*Id.* at p. 3).^{*} Judge Wyatt gave short shrift to

^{*} Absolutely no evidence or citation of authority was offered at anytime in support of what seems to be appellant's key—and erroneous—contention: that the assignment of an IRS Revenue Agent always denotes a civil tax investigation.

this argument as a basis for quashing the subpoenas (A-7), and denied the motion to suppress, without prejudice to the issue later being raised should Beck and Freedman be indicted. (A-28).

D. The Manalin 6(e) Order

The Government, while not conceding that a 6(e) order was necessary for a purely criminal investigation, requested an order pursuant to F. R. Crim. P. 6(e) to memorialize the safeguards described in its affidavit in opposition to the motion. (Paras. 6-11). In response, the District Court made two things clear: (1) It would require the agents to be identified and limited to only one type of agent from each agency,* (A-11-13); and (2)

* Unfortunately, the court declined to hear the Government on an order that would give recognition to efficient management of the entire investigation by use of a team approach. The order issued as to Manalin, we respectfully submit, deprives the government of its right to effectively conduct its investigation into the activities of Manalin:

Mr. Wilson: You have a proposed order, the Rule 6(e) order which I have referred to in my affidavit, and I think your Honor can deal with that at a later time at your leisure. I am not suggesting that it's necessary, but I think it's probably good insurance against further motion (sic) of this type.

The Court: Well, I am not going to authorize you to disclose to everybody in the FBI, everybody in the Internal Revenue Service and everybody in the Department of Health, Education and Welfare.

Mr. Wilson: No, your Honor, I am not asking for that.

The Court: It might be the human race.

Mr. Wilson: No, your Honor, I am not asking for that. (A-11).

The Court: You say "disclose to duly authorized persons."

Mr. Wilson: Yes, your Honor.

[Footnote continued on following page]

The Court: Duly authorized by whom?

Mr. Wilson: May I explain that term and maybe it should be made more specific.

A duly authorized person is an investigator in one of those agencies which is assigned to investigate a particular case.

Now, to explain, this investigation really consists of about twenty-five different investigations into hospitals, clinics, laboratories and other types of activities.

On each individual investigation, which is a separate investigation, there is one or more special agents of the Internal Revenue Service, one or two, along with one Revenue agent who does the accounting work, and if there are Title 18 aspects to the investigation, there will also be an FBI agent assigned to the case working in conjunction with them and also—

The Court: Well, who is the person from the FBI? What is his name?

Mr. Wilson: We have many agents.

The Court: Well, only one. Only one. (A-12).

Mr. Wilson: What I propose, your Honor—

The Court: Well, all right, I won't authorize that it be revealed to any of them.

Don't give it to anybody. Keep it secret.

Now, let's go on now.

Mr. Wilson: May I be heard on that?

The Court: No, you may not. I am finished.

Mr. Wilson: Your ruling will just bring the investigation to a halt.

The Court: All right, so be it.

Mr. Wilson: May I be heard?

The Court: No, you may not. You have been heard.

Mr. Wilson: Your Honor, you are not giving me a chance to respond to your question.

The Court: You told me there are twenty-five from each agency, and you are making them, in effect, Assistant United States Attorneys.

Mr. Wilson: No, your Honor, you misunderstood. I didn't make myself clear.

The Court: I asked you for the name of one person from the FBI. That I am willing to do. One person from the Internal Revenue Service; one person from the Department of Health, Education and Welfare, but no more (A-13).

* * * * *

[Footnote continued on following page]

it would only issue the order with respect to the Manalin Realty Company, and no other investigation:

The Court: I asked you for the name of one person from the FBI: That I am willing to do. One person from the Internal Revenue Service; one person from the Department of Health, Education and Welfare, but no more. (A-13).

Mr. Wilson: As to this particular case, your Honor?

The Court: As to the——

Mr. Wilson: Manalin Realty?

The Court: As to this realty company, yes.

* * * * *

The Court: All I am concerned about is the matter that is before me, and if it relates to this (A-15) partnership, this realty company.

Mr. Wilson: Yes, your Honor.

The Court: Now, who is it that you want to be able to reveal the information to?

Mr. Wilson: Your Honor, I had attempted in this order to fashion an order which would cover the entire investigation, and the way I suggest that it be done is that there would be——

The Court: Apparently you are taking the grand jury proceedings and broadcasting them to these three agencies.

Mr. Wilson: No, your Honor, we are not. We are not. Only the agents who are directly assigned to a particular investigation have access to the material. But my point is that in addition to Manalin Realty there are about twenty other separate unrelated investigations with different agents assigned to each one. It is on a need to know basis. In the Manalin Realty case it just so happens there are no FBI agents. There may be in the future. There is one Revenue agent and two special agents at this time. (A-14).

Mr. Wilson: As to the Manalin Realty case.
... (A-15).

On March 21, 1977, Judge Wyatt stayed the order pending an appeal of his refusal to afford counsel an evidentiary hearing for the purpose of litigating the scope of the order and the extent of the alleged previous unauthorized disclosure. From that time to the present, The Manalin Realty Investigation has been at a complete halt.

The term of the May 1976 Additional Grand Jury expires in November 1977.

ARGUMENT

POINT I

The Order Of The District Court Is Not Appealable.

Robert Beck and Jacob Freedman seek to appeal from an order pursuant to F. R. Crim. P., Rule 6(e) permitting the Government to disclose to three named agents of the Internal Revenue Service and the Department of Health, Education and Welfare evidence taken before the May 1976 Additional Grand Jury relating to Beck and Freedman and their real estate partnership, Manalin Realty. The order authorizing disclosure was issued, in part, as a response to the original motion of Beck and Freedman to suppress all evidence before the Grand Jury relating to Beck, Freedman and Manalin Realty on the ground of alleged abuse of the Grand Jury and unauthorized disclosure on the part of the Government. Beck and Freedman appear to claim that they were entitled to an evidentiary hearing on the extent of *prior* claimed disclosures, although they nowhere assert

any legal grounds for a remedy that would be available to them even if such prior disclosures were demonstrated. They also assert that the order of Judge Wyatt is appealable under 28 U.S.C. § 1291. However, Judge Wyatt's order denying the evidentiary hearing sought by appellants is not a "final decision" within the meaning of 28 U.S.C. § 1291 and is therefore not appealable. Accordingly, the appeal should be dismissed.

The Supreme Court, as well as this Court, has repeatedly emphasized the strong federal policy against piecemeal appeals in criminal matters in order to discourage unnecessary and unreasonable delays in criminal proceedings, whether before or after indictment. *Cobbledick v. United States*, 309 U.S. 323 (1940); *United States v. Ryan*, 402 U.S. 530 (1971); *DiBella v. United States*, 369 U.S. 121 (1962); *United States v. Nixon*, 418 U.S. 683, 690 (1974); *In the Matter of the Grand Jury Subpoena served on John Doe*, 546 F.2d 498 (2d Cir. 1976); *In the Matter of the Grand Jury Investigation of Violations of 18 U.S.C. § 1621*, 318 F.2d 533 (2d Cir.), cert. dismissed, 375 U.S. 802 (1963); (hereinafter "General Motors"); *United States v. Alessi*, 544 F.2d 1139 (2d Cir.), cert. denied, 45 U.S.L.W. 3364 (November 15, 1976). This is particularly true of Grand Jury proceedings where the general rule is that an order denying relief stemming from a motion to quash a grand jury subpoena (except a contempt citation) is not appealable. *Cobbledick v. United States*, *supra*; *General Motors*, *supra*. *In re Millow*, 529 F.2d 770, 772 n. 3 (2d Cir. 1976). See also *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973). "The duration of its [the grand jury's] life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other." *Cobbledick v. United States*, 309 U.S. at 327.

Realizing that "encouragement of delay is fatal to the vindication of the criminal law", *Id.* at 325, this Court has only permitted appeals under § 1291 under the authority of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) "when the district court order is collateral to the main proceeding but has grave consequences to the losing party, and review of the final judgment will not provide adequate relief." *In the Matter of the Grand Jury Subpoena served on John Doe, supra*, 546 F.2d at 500. See *Perlman v. United States*, 247 U.S. 7, 13 (1918). The present appeal simply fails to meet this test. Indeed, were appeal allowed from this order, "grave consequences" would accrue to the Government.

To the extent that review of the denial of the evidentiary hearing is directed toward furthering the appellants' original motion to suppress evidence in the investigation, any appellate adjudication of the conclusory assertion that the Grand Jury had violated Beck or Freedman's rights is premature, since any claims of conduct affecting their rights can be litigated if and when an indictment is returned against one of the targets, and an appeal from an adverse ruling can be taken in the event of conviction.* *In the Matter of the Grand Jury Subpoena served on John Doe, supra*, 546 F.2d at 501; see *General Motors, supra*, 318 F.2d at 535. For this purpose, appeal at this time would clearly not be "collateral" within the meaning of *Cohen*, since it clearly is tied to a prosecution "in esse" and cannot be regarded as independent. *DiBella v. United States, supra*, 369 U.S. at 131-32.

* Even if the Grand Jury had been or were to be used for civil purposes, which as a matter of fact is entirely untrue, as Judge Wyatt found (A-28), the improper use of Grand Jury testimony could similarly be litigated in any resulting civil proceeding rather than prematurely in an appeal to this court. *In re Special March 1974 Grand Jury (Ingram Corporation)* 541 F.2d 166 (7th Cir. 1976), cert. denied, 45 U.S.L.W. 3634 (March 21, 1977). *Witte v. United States*, 544 F.2d 1026, 1029 (9th Cir. 1976).

Beck and Freedman rely in large part upon the decision of the United States Court of Appeals for the Ninth Circuit in *In re: Grand Jury, J. R. Simplot Co. v. United States District Court*, — F.2d — (9th Cir., Nov. 12, 1976, as modified May 2, 1977).^{*} The Government respectfully submits that *Simplot* was wrongly decided, and is totally inconsistent with numerous decisions of this Court;^{**} at any rate, it is distinguishable in such important respects from the present case that it aids appellants neither with respect to appealability nor with respect to their substantive claims, discussed in Point II, *infra*. In particular, the *Simplot* court, noting that it was "mindful of the drawbacks of interlocutory appeal," held "only that Simplot has made a showing sufficient to make review appropriate in this case" because, in part, "the existence of a potential civil tax proceeding has been shown. . . ." *Simplot*, slip op. p. 4. In this case, by contrast, there is simply no civil proceeding involving the appellants' tax liability^{***} and the participation of the IRS, as well as of the other personnel, was solely with respect to the pending criminal investigation, as Judge Wyatt noted. Rather, the facts of this case are governed by numerous decisions of this Court denying appellate review of interlocutory decisions in a criminal proceeding.

^{*} A motion by the Government for rehearing and a suggestion for rehearing *en banc* has been pending in the Ninth Circuit since December 27, 1976. Accordingly the mandate in *Simplot* has been stayed. F. R. App. P., Rule 41(a).

^{**} For example, it is significant that with respect to a key element on the Court's discussion of appealability, the Court relied on a *dissenting* opinion to this Court's decision in *Baker v. United States Steel Corp.*, 492 F.2d 1074 (2d Cir. 1974). See *Simplot*, slip op. p. 3.

^{***} In *Simplot*, "For two or three years prior to convening the grand jury in this case the Internal Revenue Service (IRS) had been investigating the civil tax liability of" *Simplot*. *Simplot*, slip op. p. 2. This acknowledged fact was, of course, an important factor in the Court's decision.

In the first place, there is absolutely no allegation of tangible injury to plaintiff that has occurred, much less a demonstration of the "grave consequences" required in this Circuit. *In the Matter of The Grand Jury Subpoena served on John Doe, supra.* Indeed in *John Doe*, the appellants could point to the fact that if they were correct continued Grand Jury investigation of the targets and Doe, their attorney-investigator, could allegedly have deprived them of Doe's services and perhaps discouraged people from giving testimony freely before the Grand Jury helpful to the targets because of intimidation of Doe. A far more articulable present harm than shown in the present case was not sufficient for this Court to impede the ongoing investigation. Rather, the appellants had to be satisfied with future remedies, if any.

General Motors, supra, involved a case where if plaintiffs were correct the Government would be using an on-going Grand Jury improperly as a discovery tool to aid in the trial of a criminal case in another District. Nevertheless, the Court did not find that to be a sufficient justification for intruding prematurely into the Grand Jury process, and the appeal was dismissed.*

Most instructive as to this Court's reluctance to interfere in decisions affecting Grand Jury activities is *Baker v. United States Steel Corp.*, 492 F.2d 1074

* The purported distinction noted in *Simplot*, slip op. at p. 4 n. 4, that an indictment existed in *General Motors*, is illusory. The fact that an indictment has not yet been returned does not alter the fact that an appeal at this stage would significantly hamper an ongoing criminal proceeding, i.e., the Grand Jury's investigation. The distinction between pre-indictment and post-indictment delay of the criminal process was expressly negated in *Cobbledick, supra*, 309 U.S. at 327. In any event, in *General Motors* no indictment had been voted by the Grand Jury whose actions the appellants were challenging.

(2d Cir. 1974). There the Court dismissed an appeal despite the fact the appeal had resulted in no interruption of an ongoing criminal investigation and even though the Court expressly recognized that if the order below were erroneous "considerable harm could result not only to appellants but also to the public interest in maintaining confidentiality of grand jury proceedings. The minutes once disclosed could not be restored to a state of secrecy." *Id.* at 1078. The Court also found that the "disclosure of grand jury proceedings may substantially inhibit the deliberations of other grand juries and the willingness of witnesses to appear and testify freely in the future. . . ." *Id.* at 1079. Thus, in *Baker* the very injuries that justified appealability in *Simplot* were concretely foreseeable, if appealability was denied in the interests of avoiding piecemeal review. In the present case, Beck and Freedman raise only speculation of the possibility of improper disclosure—speculation that was not only refuted by the Government's affidavit, but is totally obviated by the 6(e) order now in force.

Where, as here, the District Court has found no basis for holding an adversary hearing, which in many cases will unnecessarily expose the approach of the Government's investigation and which will perhaps as often as not result in more exposure of the Grand Jury proceedings rather than less, see *Robert Hawthorne, Inc. v. Director of Int. Rev.*, 406 F. Supp. 1098, 1127 (E.D. Pa. 1976) there is inadequate justification for appellate review. It should not be forgotten that besides the possible remedies appellants have in later civil and criminal actions or in contempt proceedings against appellants should they be recalcitrant,* Grand Jury

* These possibilities for review in which appellants can be expected to protect their own interests distinguish *United States v. Doe*, 455 F.2d 753 (1st Cir.), *aff'd in part and vacated in part on other grounds*, 408 U.S. 606 (1972) cited by appellants. See *In the Matter of Grand Jury Subpoena Served on John Doe*, *supra*, 546 F.2d at 501 n. 2.

secrecy can be protected from flagrant abuse by inquiry by the District Court where it deems necessary and by possible contempt citation of those people abusing the rules safeguarding Grand Jury secrecy.*

To grant appellate review on unfounded allegations, as in this case, could have "grave consequences" to the Government, the Grand Jury system, and the administration of justice rather than for the appellants. The appeal in this case by the time of oral argument will have delayed the Grand Jury investigation of Manalin Realty, Beck and Freedman for over three months and, because of the ambiguities of the order below (which could not be corrected by the District Court while jurisdiction over the order was in this Court) has all but stopped in its tracks the entire May 1976 Additional Grand Jury investigation into Medicaid and Medicare fraud, virtually that Grand Jury's only business.** Appeals of denials of evidentiary hearings

* The proper remedy for breach of disclosure of Grand Jury information, even if such a breach existed, is not sanctions against the Grand Jury or its work (as Judge Wyatt recognized), but corrective action by the Court including possible contempt citations where appropriate. See Point II *infra*. See *United States v. Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1249 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973); *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), *aff'd* 381 U.S. 293 (1966); *United States v. United States District Court*, 238 F.2d 713, 721 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957); *United States v. Schiavo*, 375 F. Supp. 475, 478 (E.D. Pa.), *aff'd*, 506 F.2d 1053 (3d Cir. 1974); *United States v. Smyth*, 104 F. Supp. 283, 292-93, 302-04 (N.D. Cal. 1952).

** Thus, whatever the merits of a more expansive approach to the appealability of Grand Jury proceedings on the theory a Grand Jury can jump from case to case, if one matter is interrupted, see *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 605 n. 8 (D.C. Cir. 1976), cited by appellants, this simply does not apply to the investigations being conducted by the May 1976 Additional Grand Jury. Moreover, such an approach is entirely inconsistent with the language of *Cobbledick, supra*, and does not take into account the reality that delay will often cause evidence to be lost or destroyed, or in some cases result in lost prosecutions due to the running of the statute of limitations.

would open an avenue for delay in nearly every complex investigation since such investigations almost invariably require disclosure to a number of personnel employed in one or more Government agencies who are not Assistant United States Attorneys. Under the holding of *Simplot* each target or even witness before a Grand Jury could litigate an evidentiary hearing ascertaining the manner in which the Grand Jury investigation was being conducted and appeal the results of that hearing. The disruption to effective law enforcement and smooth functioning of the Grand Jury from such an outcome is obvious.

In light of the importance of the Grand Jury in the enforcement of the criminal laws, the courts have jealously guarded the independence of that body, see *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Blair v. United States*, 250 U.S. 273, 282 (1919); *Hale v. Henkel*, 201 U.S. 43 (1906); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975), and have repeatedly rebuffed attempts to impede its freedom "to pursue its investigations unhindered by external influence or supervision", *United States v. Dionisio*, 410 U.S. 1, 17 (1973) or otherwise to "delay and disrupt grand jury proceedings" *United States v. Calandra*, *supra*, 414 U.S. at 349. Particularly since, as we shall demonstrate in Point II, Beck and Freedman have already been granted far more protection than the law requires, and since the sole purpose of their requested "evidentiary hearing" would be to explore their unfounded claims of prior disclosures, the appeal should be dismissed. *In the Matter of the Grand Jury Subpoena Served on John Doe*, *supra*.

POINT II**The District Court Did Not Abuse Its Discretion In Declining to Hold an Evidentiary Hearing.**

Through conclusory allegations, Beck and Freedman contend that Grand Jury testimony and evidence is being unlawfully disclosed to a substantial number of persons other than attorneys for the government; that such disclosure is made improperly to agencies outside the Department of Justice; that some of the agencies have no enforcement authority over the statutes cited in the subpoenas issued to Beck and Freedman and their entities, and that minimal supervision is being conducted of the agents' activities by the Assistant United States Attorneys in charge of the investigation. (Br. pp. 8-9). Undeterred by a total lack of supporting evidence, the appellants also suggest that the participation of IRS Agents in the investigation prove that the Grand Jury is being illegally used for a civil tax investigation.

In response to appellants' sweeping and unfounded allegations, the Government detailed the background, organization and operation of its investigation into Medicaid and Medicare fraud particularly with respect to the May 1976 Additional Grand Jury.* The response indicated that agents of the IRS, FBI and HEW are involved in a joint Medicaid/Medicare criminal fraud investigation, which covers potential violations of both Title 18 and 26, United States Code. It was unequivocally stated that this investigation was purely criminal in purpose. Judge Wyatt found there was no civil tax investigation of Manalini being conducted and thus that *Simplot* did not apply. (A-28). These facts are uncontested on appeal, as they were below.

* Affidavit of Assistant United States Attorney George E. Wilson in opposition, sealed and filed on March 22, 1977.

A. The 6(e) Order Was Entirely Proper

The Government requested as to the entire investigation (but was granted only as to Manalin Realty Company) an order pursuant to F.R.Crim. P. 6(e) authorizing disclosure of information received by the May 1976 Additional Grand Jury to agents participating in the Medicaid/Medicare investigation ("6(e) order"), *nunc pro tunc* to the beginning of the Grand Jury's term, chiefly to alleviate any question as to the propriety of the procedures followed in the investigation as explained in the government's affidavit and to memorialize the procedures that had been taken to ensure Grand Jury secrecy. (A-2-3).

The 6(e) order was sought out of an overabundance of caution, and the Government does not concede its necessity. Because of the possible uncertainty surrounding the interpretation of Rule 6(e) in a particular district or circuit, government attorneys have sometimes obtained court orders to disclose grand jury materials to agents assisting in the investigation out of an abundance of caution. See, e.g., *In re Grand Jury Investigation William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 476-7 esp. n.31 (E.D. Pa. 1971), *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1120 n.38 (E.D. Pa. 1976). In other cases, like the instant one, an order was proposed in order to clarify the extent of disclosure and to obviate further motions. There have also been cases where the subpoenaed party has asked the court for some limiting order to protect his interests. See e.g., *United States v. Universal Manufacturing Co.*, 525 F.2d 808 (8th Cir. 1975), upholding a relatively broad disclosure of materials to the FBI. It has long been the interpretation of Rule 6(e) by the Department of Justice, supported by a substantial body of decisions of federal courts, that an attorney for the government, upon his own authority and without an order from the court, may make certain disclosures to criminal investigatory personnel for the purpose of discharging his duties as a government attorney

in aiding the Grand Jury to effectively perform its function of investigating violations of the criminal law. Statement of Richard L. Thornburgh, Acting Deputy Attorney General, before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, February 23, 1977. For example, in numerous cases the courts have discussed procedural aspects of disclosure without any intimation that a Rule 6(e) order is necessary in a criminal investigation. *Coson v. United States*, 533 F.2d 1119, 1121 (9th Cir. 1976); *Witte v. United States*, *supra*, 544 F.2d at 1029 (9th Cir. 1976); *United States v. Hoffa*, *supra*, 349 F.2d at 43 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966) ("nothing irregular" in limited disclosure of Grand Jury minutes to agents of the FBI); *United States v. Dunham Concrete Products*, *supra*, 475 F.2d at 1248-49; *United States v. Evans*, 526 F.2d 701, 707 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3249 (October 4, 1976). *In Re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956); *United States v. Culver*, 224 F. Supp. 419, 432 (D. Md. 1963); *United States v. Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970); *United States v. Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.).

Such an interpretation of Rule 6(e) is unquestionably founded in common sense.* For example, if disclosure

*In any event, any uncertainty concerning either the need for a formal order or the scope of Rule 6(e) will soon be resolved. Pursuant to 18 U.S.C. §§ 3771 and 3772, on April 26, 1976, the Supreme Court promulgated amendments to the Federal Rules of Criminal Procedure, including an amendment to Rule 6(e), which, in the absence of action by Congress, would have gone into effect on August 1, 1976. On July 8, 1976, a bill was enacted (Act of July 8, 1976, P.L. 94-349, 90 Stat. 822) which extended the effective date of these amendments to August 1, 1977, in order that Congress might have additional time to review the amendments.

Under these amendments, Rule 6(e) would be amended by adding the following sentence: "For purposes of this subdivision, 'attorneys for the government' includes those enumerated in rule

[Footnote continued on following page]

were not allowed to government personnel assisting the prosecutor without a Court order, a 6(e) order would be required before the preparation of virtually any criminal trial since in nearly all such cases the United States Attorney works both with an agent of some kind and with Grand Jury testimony in preparing the case for trial. The cumbersomeness of a procedure requiring the granting of a 6(e) order in the thousand of cases using agency personnel in preparation for trial is self-evident. Similarly, under a contrary interpretation every time a Grand Jury exhibit was turned over to an agency for handwriting analysis, fingerprint analysis or the like, a 6(e) order would be required, again a cumbersome process. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, *supra*, 406 F. Supp. at 1126 (E.D. Pa. 1976).

54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties", after the first sentence of the rule (i.e., "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties)."

The Notes of the Advisory Committee confirm that the intent underlying the proposed change is simply to codify present practice rather than create a substantive change. They point out that "there is often government personnel assisting the Justice Department in grand jury proceedings" and go on to observe that although the "case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required." This proposed amendment is thus designed merely to adopt the present trend of case law governing this aspect of Rule 6(e) disclosure.

Thus, appellants are in the extraordinarily anomalous position of seeking an evidentiary hearing only to determine whether their conclusory allegations have any substance when 1) the prevailing weight of authority demonstrates that no 6(e) order was necessary anyway; 2) they in fact are now protected by an unusually restrictive 6(e) order; and 3) beginning August 1, 1977, their claims will have no merit, even assuming that they now had case law to support it.

The need for expert assistance by agency personnel is obvious:

"As we have noted above, the United States Attorney's Office does not employ investigators, accountants, auditors or persons trained in the examination and analysis of banking, corporate, business and financial records, and the attorneys on the staff of the United States Attorney's Office do not generally have the time, training or accounting expertise necessary to conduct detailed and technical document examinations for investigatory purposes."

Robert Hawthorne, Inc. v. Director of International Revenue, *supra*, 406 F. Supp. at 1113. Under the first sentence of Rule 6(e), the United States Attorney has the power to disclose Grand Jury materials to the agency personnel who work under his aegis in preparing the case for presentation to the Grand Jury. *In re Grand Jury Investigation William H. Pflaumer & Sons, Inc.*, *supra*, 53 F.R.D. at 476-77; *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill. 1973). Such use of agency personnel to assist the United States Attorney and the Grand Jury is not only necessary and permissible, it is advisable. *Coson v. United States*, 533 F.2d at 1121; *Witte v. United States*, 544 F.2d at 1029. The only limitation inherent in the rule is that the materials may be used only in furtherance of the Grand Jury's business, i.e., investigation of possible criminal conduct.

The United States Attorney is more than simply a legal advisor to the Grand Jury. It is he, subject to the vote of the Grand Jury and its suggestions, who decides whether to prosecute, when to prosecute and on what charges to prosecute. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir., 1974); see also *United States v. Cowan*, 524 F.2d

504 (5th Cir., 1975), *cert. denied*, 425 U.S. 971 (1976). It follows it is he who is in the best position to determine what assistance he needs in preparing cases for the Grand Jury.*

“[T]he grand jury in modern times has lost much of its independent force. Composed of layment (sic) functioning in a part-time capacity, the grand jury is hardly capable of taking the initiative in the often complex matters arising in federal criminal litigation. It must necessarily rely on the Executive Branch—specifically, the Justice Department under the direction of the Attorney General—to initiate and prepare the criminal cases which come before it.” 8 Moore’s *Federal Practice* (2d ed.), par. 6.02[1] (footnotes omitted).

Since a Rule 6(e) order was not required in the first instance, there is certainly nothing improper about granting such an order retroactively, in order to memorialize the procedures that had been used, upon a showing that sufficient procedures had been followed in the investigation.** Even if this Court were to find that until August 1 of this year a 6(e) order is required, contrary to the implicit recognition of most of the decided cases as well as the practice in many districts, the affidavit of Assistant United States Attorney, George E. Wilson, makes clear that absolutely no injury was suffered by appellants from the failure to obtain such a 6(e) order since adequate pro-

* We respectfully suggest that Judge Wyatt, in arbitrarily limiting disclosure to one of each type of agent regardless of function (A-11-15), has curtailed the government’s ability to conduct the Manalin Realty Company investigation in the most efficient and expeditious manner. See *United States v. United States District Court*, *supra*, 238 F.2d at 719, 722.

** Thus, quite contrary to appellants’ brief at 10, there is no admitted violation of Rule 6(e), much less admission of the gross abuse charged by appellants.

cedures had been instituted to properly guard Grand Jury secrecy. Thus, even if a 6(e) order had been required, Judge Wyatt did not abuse his discretion by not imposing severe sanctions, such as the suppression of evidence or by failing to hold an evidentiary hearing into the extent of prior disclosure.

B. The Adversary Hearing Was Properly Denied

While apparently not contesting the principle that agents may be granted access to matters occurring before the Grand Jury, Beck and Freedman nevertheless demand an adversary hearing into the conduct of the Medicaid/Medicare investigation with respect to the May 1976 Additional Grand Jury. Their reasons for this demand, although not clearly stated, appear to be twofold. First, they wish to establish the extent of the alleged violations of Rule 6(e). Presumably this will form the basis for some sanction, perhaps the suppression of evidence sought in their original motion or at the very least to make a record for a subsequent pretrial suppression motion.* Second, it appears that appellants claim the right to contest the scope of the inquiry against them including the ascertaining of the identity and functions of each of the investigators assigned to this case and the extent of their access to Grand Jury information to protect against unwarranted disclosure of Grand Jury information.

Given the complete absence of any plausible evidence of abuse of Grand Jury process, and given the great weight of authority that agents are permitted to assist the attorney for the government under the first sentence of Rule 6(e), the nature of the relief sought by appel-

* As indicated in Point I, *supra*, these sanctions are properly pursued during pre-trial proceedings in the event of an indictment or, during the course of civil proceedings should they be instituted.

lants in this case is extraordinary. The Supreme Court in *Blair v. United States*, 250 U.S. 273, 282 (1919) discussed the historic function of the Grand Jury in the following terms:

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

More recently in *United States v. Calandra*, 414 U.S. 338, 343-44 (1974), the Supreme Court commented upon the wide latitude traditionally accorded the Grand Jury to inquire into violations of criminal law:

"No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. . . . The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."

Mindful of the fundamental role played by the Grand Jury in the enforcement of the criminal law, courts have been vigilant in their efforts to ensure that delay and procedural impediments not be employed to frustrate the functioning of the Grand Jury. See e.g., *In re April*

1956 Term Grand Jury, *supra*; *United States v. United States District Court*, *supra*, 238 F.2d at 719, 722; *In re Grand Jury Investigation William H. Pflaumer & Sons, Inc.*, *supra*, 53 F.R.D. at 477.

Appellants' contention that the District Court be required to hold an adversary hearing before permitting an ongoing Grand Jury investigation to continue poses the precise threat to the functioning of the Grand Jury that the Supreme Court warned against in *United States v. Calandra*, *supra*, 414 U.S. at 349-50. There the Court held that a Grand Jury witness could not invoke the exclusionary rule in the Grand Jury in order to prevent the introduction of allegedly illegally seized evidence:

"The probable result would be 'protracted interruption of grand jury proceedings,' *Gelbard v. United States*, 408 U.S. 41, 70 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

'Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.' *United States v. Dionisio*, 410 U.S. 1, 17 (1973)."

Indeed, this very appeal underlines the legitimacy of the Court's concern in *Calandra* that adjudication of such issues prior to trial "would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." 414 U.S. at 349. As a result of

appellants' motion and the resulting stay, the investigation of Manalin Realty Company and the appellants' activities has been at a complete halt for approximately three months. Further, a hearing as suggested by appellants would not only provide a ready means of delay but would amount to the kind of mini-trial specifically condemned in *Calandra* and *Dionisio*. See also *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir. 1976). Not only would such a hearing interrupt the Grand Jury's investigation with a mini-trial (undoubtedly to be followed by a further appeal), but would also necessarily result in disclosure of proceedings occurring before the Grand Jury. Such a hearing would be justified only in the most extreme cases of abuse, not on the basis of unfounded accusations.* See *United States v. Universal Manufacturing Co.*, *supra*, 525 F.2d at 812; *In the Matter of a Grand Jury Subpoena served upon David Doe*, Dkt. No. 77-1047, slip op. 2403, 2409 (2d Cir., March 17, 1977), citing with approval *In re September 1975 Grand Jury Term*, *supra*, 532 F.2d at 737.

Appellants place their reliance solely on the Ninth Circuit's *Simplot* decision ** in support of their demand for an adversary hearing to litigate, person by person, the necessity for each and every agent assigned to the Manalin Realty Company investigation. The Court in *Simplot*,

* Adversary hearings concerning alleged improprieties in the Grand Jury process have been denied even after indictment when based on insufficiently supported assertions or where no prejudice has been shown. *United States v. Peden*, 472 F.2d 583, 584 n. 4 (2d Cir. 1973). See *Lawn v. United States*, 355 U.S. 339, 348-50 (1958); *United States v. Birrell*, 447 F.2d 1168, 1173 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972).

** On May 2, 1977, the panel modified its original opinion by limiting its ruling to the Internal Revenue Service. This does not alter the overall reasoning of the case, which we submit is erroneous.

although addressing itself to disclosure for civil purposes—a purpose that admittedly departs from the primary function of the Grand Jury to inquire into criminal violations (and which is totally absent in this case)—proceeded (in dictum and without a scintilla of precedential support) a step further to require an adversary hearing concerning the participation of agents in an ongoing criminal Grand Jury investigation.*

The requirement in *Simplot* of an adversary hearing conflicts with the settled principle that no Grand Jury witness (and *a fortiori* no target) is entitled to set limits to the investigation that the Grand Jury may conduct. *Blair v. United States*, 250 U.S. 273, 282 (1919); *United States v. Dionisio*, 410 U.S. 1, 15 (1973); *United States v. Calandra*, *supra*, 414 U.S. at 345. Further, the *Simplot* opinion is internally inconsistent in that while its holding is based, at least in part, on the need to protect Grand Jury secrecy, the remedy the Court fashioned would clearly result in a breach of that secrecy by exposing the workings of that Grand Jury to its targets or other witnesses.

* The suggestion in *Simplot* (slip op. 8, n. 15) that the United States Attorney "cannot be entrusted with passing on the necessity of assistance" is tantamount to saying he cannot be trusted to do his own job. His duty is not merely to act as an adversary, but rather to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). He is the one person who best knows what assistance is needed to further the grand jury's inquiry. Should he abuse the grand jury by making an improper disclosure or use of grand jury material he would be subject to citation for contempt. "[B]ut this is no reason why the court should hamper * * * [Government attorneys] in the proper discharge of their duties by denying them free use of the evidence and the documents which have been produced before the grand jury." *United States v. United States District Court*, *supra*, 238 F.2d at 721. See also *United States v. Dunham Concrete Products, Inc.*, *supra*, 475 F.2d at 1249; *United States v. Hoffa*, *supra*, 349 F.2d at 43.

In short, "a ritual designed to preserve grand jury secrecy should not be the vehicle for its breach." *Robert Hawthorne, Inc. v. Director of Int. Rev.*, *supra*, 406 F. Supp. at 1127. In many investigations, particularly those involving organized crime, gambling, narcotics, trafficking in illegal firearms, and the like, the mere knowledge that an investigation is under way would seriously impede the conduct of that investigation and quite possibly endanger the lives of both witnesses and law enforcement officers involved in that investigation.*

Simplot is further in error by requiring the government to show the necessity of the use of each agent to a reviewing court. While the opinion is correct in requiring a showing to a court of a "particularized and compelling need" to turn Grand Jury information over to an agency for civil use, *Simplot* fails to distinguish between disclosures contemplated in the first sentence of Rule 6(e), to assist the Grand Jury, and those using Grand Jury testimony outside the investigation contemplated in the second sentence. An agent by agent justification would unnecessarily straight-jacket the prosecutor and the Grand Jury in effective investigation of complex crime with very little compensating benefit. Under the proposal advanced by the appellant, a United States Attorney conducting a Grand Jury investigation who finds that he needs the assistance of a particular investigative agency would have to stop that investigation, go before the District Court and

* The inevitable result of the adversary hearing would be a disclosure of grand jury material to, in a number of instances, the very persons who should be the last to be advised of the available evidence in the middle of an investigation. For example, it could easily be disclosed at an adversary hearing that a target's partner or associate had secretly provided the grand jury with information on complicated transactions that would be unknown except for his testimony. See *United States v. Proctor & Gamble, Co.*, 356 U.S. 677, 681-682 (1958).

ask for approval of such assistance. This, in turn, would require notifying the parties under investigation (assuming they can be identified) that a hearing will be held, with all the attendant delays inherent in scheduling such hearings. Even if the Government should prevail at the hearing and assistance be authorized, the order entered by the District Court might well be stayed pending the outcome of an attempted appeal, thereby further delaying the Grand Jury's investigation much the same as the appellants have managed to do in this case. The effect of following the procedure suggested by appellants is obvious: Grand Jury investigations will be further impeded, delayed, and, in many cases, completely thwarted. Rather than being kept secret, they would be opened to the public—especially the targets—insofar as disclosures of proceedings occurring before the Grand Jury would necessarily be made at the adversary hearing. Such a result is neither warranted nor justified.*

Appellants also claim a right to protection against allegedly unauthorized disclosure of Grand Jury material. (Br. 14). In denying the motion to suppress without prejudice, Judge Wyatt expressed that the proper remedy for any alleged breach should be raised in a "motion to

* Thus, even assuming *arguendo* that the drastic remedy of a hearing is warranted, there is no reason offered by appellant nor is any found in *Simplot* why it should be an adversary one. If any hearing is necessary to protect Grand Jury secrecy and independence, an *ex parte* hearing would best achieve those goals for reasons already adverted to. Certainly not all judicial rulings which may affect the rights of present or potential defendants need be made only after an adversary hearing. See *Gerstein v. Pugh*, 420 U.S. 103, 119-124 (1975). It is the function of the court and not a witness to see that the grand jury's process is not abused or used for purposes of oppression and injustice. *United States v. United States District Court*, *supra*, 238 F.2d at 722; *In Re September 1975 Grand Jury Term*, *supra*, 532 F.2d at 737.

suppress or in any other procedural fashion" (A-28). This ruling was entirely correct. *United States v. Calandra, supra*, 414 U.S. at 350; *In the Matter of the Grand Jury Subpoena Served on John Doe, supra*, 546 F.2d at 501. *In re April 1956 Term Grand Jury, supra*, 239 F.2d at 272-73. See also *Coson v. United States, supra*, 533 F.2d at 1120.

CONCLUSION

The appeal should be dismissed; in the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Peter Bloch being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the **3rd** day of **June, 1977**
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

S. Andrew Schaffer, Esq.
Stanley S. Arkin, p.c.
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New York, New York 10016

And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
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City of New York.

Peter M. Bloch

Sworn to before me this

3rd day of June 1977

Maria A. Israelian

MARIA A. ISRAELIAN
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Term Expires March 30, 1978